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No. 85-1672

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1985

UNITED STATES OF AMERICA,

Petitioner,

v.

WILLIAM D. MERCHANT,

Respondent.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a defendant's rights to due process and to be free of unreasonable searches and seizures are violated by a warrantless search conducted pursuant to a probation condition, that was imposed in his absence, without his knowledge, and without his consent.

2. Whether the "good faith" exception to the Fourth Amendment exclusionary rule should be expanded beyond the warrant context and should apply to law enforcement officers' purported reliance on a search clause in a defective probationary order which the officers knew was entered without notice to the defendant.

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STATEMENT

An elaboration and clarification of several matters will assist the Court's consideration of the issues raised by the Petition.

1. a. Contrary to petitioner's assertion (Pet. at 4), respondent never accepted or consented to the terms of his probation. At the misdemeanor sentencing hearing on November 14, 1980, the Municipal Court articulated several conditions of probation and then announced that the "sentence will be stayed pending your appeal" (Pet. App., 4a-5a), but never inquired whether respondent consented to those conditions. Similarly, the form which respondent signed at the conclusion of the hearing called for respondent's acknowledgement that he had "read and understood the . . . conditions of probation" (E. R. 119; GX G-2-A; see, 5/21/81 Tr. 21), but nowhere did respondent manifest his consent to those terms.[1] Indeed, respondent knew that the trial court had already issued the oral order staying his sentence when he signed the document. (5/21/81 Tr. 129-130.)

b. The probation form which bears respondent's signature expressly required his formal supervision by a probation officer, who could direct petitioner to under-

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[1]Petitioner inaccurately refers to a second document as the Municipal Court's "judgment." (Pet. at 4, n. 4.) The state prosecutor previously described that document which does not bear the judge's signature, as a "confinement form." (5/21/81 Tr. 127.) Moreover, although the District Court indicated it would take judicial notice that the document was "the formal sentencing document", it was never moved or received into evidence and is not a part of the record in this case. (5/21/81 Tr. iv, 128.)

go counseling. (E.R. 119; GX G-2-A.) Similarly, the Municipal Court's oral statements expressly contemplated that when respondent's probation began he would be supervised by a probation officer. (Pet. App. 4a-5a, note 3.) However, respondent was never assigned to nor referred to a probation officer; and respondent never reported to one.

2. a. The local prosecutor testified that she received complaints of gun fire occurring on respondent's property in early to mid-January, and learned of another incident allegedly involving a threat by respondent in early February. (5/21/81 Tr. 97-100.) Although she professed concern that respondent had violated the terms of his probation (5/21/81 Tr. 100-101), the prosecutor took no steps to ensure that respondent was assigned to a probation officer or received supervision. Instead, on February 11, 1981, the prosecutor filed a motion for "Clarification and/or Modification of Stay of Judgment" with the intention of conducting a warrantless search of respondent's residence as soon as possible after the motion was granted. (5/21/81 Tr. 114; 4/30/81 Tr. 187).

b. This motion was heard by the Municipal Court on February 27, 1981. (Pet. App. 2a.) Notice of the motion had been served on respondent's counsel who appeared at the hearing. (5/21/81 Tr. 5.) However, it is undisputed that counsel had failed to inform respondent of either the motion or the hearing. (5/21/81 Tr. 5.) Although the Municipal Court noted respondent's absence, it made no inquiry concerning respondent's waiver of his right to be present or of counsel's authority to act on behalf of respondent in his absence. (Pet. App. 22a.) Without objection from respondent's counsel, the Municipal Court

granted the motion and stated that respondent would "be *reinstated* on the terms of probation." (Emphasis added.) (*Ibid.*)

c. At the time of the hearing on the motion for clarification/modification the local prosecutor informed neither the Municipal Court judge nor defense counsel of her intention to conduct a warrantless search of respondent's residence as soon as possible after the motion was granted. (Pet. App. 12a.)

3. a. Shortly after the hearing on February 27, the prosecuting attorney informed an investigator in her office that the motion had been granted and told him that "I want a search . . . . " (4/30/81 Tr. 189; 5/21/81 Tr. 41.) However, because of manpower difficulties, a search party could not be assembled until March 3, 1981, four days later. (5/21/81 Tr. 41-42.)

b. Also on February 27, respondent's counsel wrote a letter to respondent informing him of the prosecutor's motion for the first time and alerting respondent that his probation was now in effect. (5/21/81 Tr. 23-24.) However, the letter was later returned to counsel unopened and respondent remained unaware of the court's order until nine armed police officers, led by the prosecuting attorney, arrived at his residence prepared to forcibly enter and search. (*Id.* at 5-9.)

c. The search party arrived at the premises at approximately 11:00 a.m. on Tuesday, March 3, 1981. (5/21/81 Tr. 29.) Included in its number were several local police officers, including representatives from narcotics enforcement, as well as the prosecuting attorney who had filed the motion to modify respondent's probation status

in order to be able to enter respondent's home without a warrant. (5/21/81 Tr. 102; 138.) Upon the group's arrival at respondent's door, respondent insisted that he was not on probation and refused them entry. (*Id.* at 29-31.) Respondent then requested and was permitted to call his attorney, who spoke to the prosecutor and confirmed that respondent had not yet been informed of the February 27th order subjecting him to the terms of probation. (5/21/81 Tr. 10, 31-32, 121-122; 4/30/81 Tr. 197.)

d. Following his conversation with the prosecutor, respondent's counsel telephoned the Municipal Court judge who had presided at the February 27th hearing. (5/21/81 Tr. 10.) Judge MARLO then telephoned the prosecuting attorney at respondent's residence to discuss the situation. (4/30/81 Tr. 199; 5/21/81 Tr. 121.) Having been informed for the first time that respondent had never received notice of the February 27th proceedings and remained unaware of the Court's order until the arrival of the search party, Judge MARLO told the prosecutor:

> . . . on more than one occasion . . . well, don't, don't take this conversation to mean that I have any opinion as to whether you should or shouldn't be doing what your doing.
>
> (4/30/81 Tr. 200.)

e. Despite these conversations, the prosecuting attorney eventually determined that the search should begin. (4/30/81 Tr. 198.) Ultimately, the search produced the contraband, chemicals, and laboratory equipment which underlay the charges that were filed against respondent in the District Court. (Pet. at 6.)

4. On the basis of the evidence discovered during the March 3, 1981 search, the Municipal Court revoked

respondent's probation. Subsequently, however, the Superior Court appellate division reversed that decision on the grounds that respondent could not be bound by probation conditions which went into effect without his knowledge.

> Due process and elementary considerations of fairness preclude revocation of probation and imposition of a jail sentence unless the defendant had theretofore been unequivocally apprised of his probation status.
>
> (E.R. 118.)

5. In denying respondent's motion to suppress, the United States District Court held that respondent's probation was in effect from the date of his sentencing on the misdemeanor offenses — i.e. November 14, 1980. (Pet. App. 17a.)[2] Alternatively, the District Court held that even if respondent was not on probation, the suppression remedy was inappropriate because the officers who executed the search had reasonably relied on the probation order. (Pet.App. 18a)

6. a. In reversing, the Ninth Circuit Court of Appeals first recognized that the question whether respondent was subject to the conditions of probation (and hence to the search clause) at the time of the March 3rd search is governed by state law, subject only to the minimum protections offorded by the federal constitution. (Pet. App. 4a.) The court next determined that under state law, respondent's entire probationary sentence was stayed because the sentencing Municipal Court judge did not specify

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[2]This holding made it unnecessary for the District Court to concern itself with the legal significance of the February 27th order, and the court did not in fact address that issue.

otherwise. (Pet.App. 5a-6a.)[3] Significantly, petitioner does not seek review from this Court of either of these holdings.

b. The Court of Appeals next considered the effect of the February 27th order. (Pet.App. 6a-10a.) Given the Court of Appeals' prior holding that respondent was not on probation prior to that date, it followed that the Municipal Court's order vacating the stay constituted "an initial imposition of probation." (Pet.App. 8a.) Because the effect of that order was to impose substantial burdens on respondent's liberty and fundamental rights, the Court of Appeals held that federal due process was violated by the absence of any notice to respondent concerning the February 27th proceedings or order. (Pet.App. 8a-10a.) This aspect of its decision was supported, the Court of Appeals noted, by the fact that respondent's state and federal rights to be present at all stages of the proceedings had also been truncated by the Municipal Court's action. (Pet.App. 10a.) Finally, the Court of Appeals emphasized that the emasculation of respondent's rights in the Municipal Court proceedings was compounded by the decision of the state authorities not to "postpone [ ] the search until it could be sure that [respondent] had received notice [of the order] from the court." (Pet. App. 10a.)

c. The Court of Appeals also rejected the contention that the suppression remedy should not be invoked because of the executing officers' purported good faith reliance on the search clause of the probation order. (Pet.

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[3]The Court of Appeals determined that this conclusion was compelled by *In re Kennick*, 128 Cal.App.3d 959, 963, 180 Cal. Rptr. 731, 733 (1982).

App. 10a-13a.) Assuming without deciding that the rationale of the *United States v. Leon*, — U.S. —, 104 S. Ct. 3405 (1984) might apply outside the warrant context, the Court of Appeals ruled that the suppression remedy was nevertheless mandated because "the state authorities' conduct was not objectively reasonable." (Pet. App. 11a, n. 6.) In reaching this conclusion, the Court of Appeals emphasized the single-mindedness with which the state authorities had engineered the "reinstatement" of respondent's probation and had then hastily organized a search despite their knowledge that respondent had received no notice that his probation had been "reinstated," and was consequently unaware that the probationary terms which the authorities suspected him of violating were then in effect.[4] The Court of Appeals concluded that the authorities' zealous determination to investigate suspected probation violations which they knew had occurred prior to the probation's "reinstatement," rendered their motives for the search suspect and their conduct objectively unreasonable. (Pet.App. 12a-13a.)

7. a. Following the Court of Appeals' decision, the government filed a petition for rehearing with a suggestion for *en banc* review. Said petition was reviewed by the entire court, but not a single judge requested a vote. (Pet App. 19a.)

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[4]As the Court of Appeals noted, the state authorities determined to conduct the search while knowing that respondent had received no supervision or counseling, had not been referred to probation officer, and that no other efforts towards the rehabilitation of respondent or the protection of society had been made. (Pet.App. 12a.)

REASONS FOR DENYING THE WRIT

The petition raises no issues which merit a writ of certiorari. Because probation was imposed upon respondent in proceedings that were deficient under both state and federal law, the validity of the probation order does not raise an important question of federal law. Similarly, the good faith exception to the exclusionary rule is inapposite, both because it should not be applied to advance-consent searches and because the unique facts of this case establish that the conduct of the officers was not objectively reasonable.

1. a. The first issue raised in the Petiton—i.e., the due process notice question—is framed too broadly and too narrowly, both at the same time. The issue is stated too broadly because the question is not merely whether a defendant must receive actual notice "of a scheduled hearing," but whether an individual may be validly subjected to the terms and conditions of probation (and thereby deprived of several fundamental rights) without his knowledge. On the other hand, the issue is framed too narrowly because the Court of Appeals' holding rests not only on the notice problem, but also on the deprivation of other fundamental procedural rights under both state and federal law. Indeed, as will be seen, the Court of Appeals' decision on the probation question was compelled by independent state grounds.

b. California courts have adopted a contractual theory for the imposition of probation: in exchange for a less harsh sentence, the defendant may accept those restrictions of his rights which are inherent in the probationary conditions. *People v. Mason*, 5 Cal.3d 759, 763-

764, 488 P.2d 630, 632, 97 Cal.Rptr. 302, 304-305 (1971), *cert. denied*, 405 U.S. 1016 (1972);[5] *In re Bushman*, 1 Cal. 3d 767, 776-777, 463 P.2d 727, 733, 83 Cal.Rptr. 375, 381 (1970). Consistent with this approach, a defendant in the state's courts "has the right to refuse probation, a right of which he cannot lightly be deprived." *In re Osslo*, 51 Cal.2d 371, 377, 334 P.2d 1, 5 (1958). Moreover, a defendant who appeals his conviction need not manifest such refusal at the sentencing hearing, but may wait instead until the appeal is finally resolved:

> [W]hatever may be within the trial court's permissible scope of conditions for *granting* probation it could not make petitioners' right to *reject* the offer of probation conditional upon their immediate announcement of rejection.
>
> *In re Osslo, supra*, 51 Cal.2d at 382, 334 P.2d at 8 (emphasis in original).[6]

It is true, as petitioner points out, that the waiver of Fourth Amendment rights in appropriate cases is a probationary condition which California courts may validly impose. (Pet. at 19-20 and n. 13). Nevertheless, the state courts "jealously guard" against the wholesale or unwitting relinquishment of such fundamental rights and "indulge every reasonable presumption against waiver . . . ."

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[5]*Mason* was disapproved on other grounds in *People v. Lent*, 15 Cal.3d 481, 541 P.2d 545, 124 Cal.Rptr. 905 (1975).

[6]In *Osslo*, the California Supreme Court held that the petitioners could not be denied the right to reject probation and demand sentence following the final determination of their appeal, even though their sentences had not been stayed pending appeal. 51 Cal.2d at 382-383, 334 P.2d at 8. Here, of course, respondent's sentence was stayed pending appeal by the Municipal Court. (See, Opp., *supra*, at 1.)

Blair v. Pitchess, 5 Cal.3d 258, 274, 486 P.2d 1242, 1253, 96 Cal.Rptr. 42, 53 (1971). Thus, a waiver will not be presumed or implied;[7] and where a waiver is found, it will be strictly and narrowly construed.[8]

Applying these principles, it is clear that under California law there was no Fourth Amendment waiver in this case. Respondent was not asked at the sentencing hearing whether he consented to the probationary terms. Compare, *Freytes v. Superior Court, supra,* 60 Cal.App.3d at 962, 132 Cal.Rptr. at 29 (wherein defendant orally agreed to warrantless search condition). Nor did the written form which respondent signed at the conclusion of the hearing call for respondent's consent to the conditions. (See, Opp., *supra,* at 1.) Moreover, respondent signed that document only after he expressed his intention to appeal and the Municipal Court had stayed his sentence. Consequently, even if the signing of that document under appropriate circumstances might constitute the unequivocal consent to the probationary terms which California law requires, here it was subject to the express condition

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[7]See, *People v. Myers*, 6 Cal.3d 811, 817-818, 494 P.2d 684, 688, 100 Cal.Rptr. 612, 616-617 (1972) (defendant's status as an outpatient of a narcotics clinic did not imply waiver); *Freytes v. Superior Court*, 60 Cal.App.3d 958, 962, 132 Cal.Rptr. 26, 29 (1976) (no waiver where probation was revoked and reinstated without express reference to maintenance of the previous search condition).

[8]See, *People v. Superior Court (Stevens)*, 12 Cal.3d 858, 528 P.2d 41, 117 Cal.Rptr. 433 (1974) (consent to search "upon request" means defendant must receive advance notice of search); *People v. Bremmer*, 30 Cal.App.3d 1058, 1064, 106 Cal.Rptr. 797, 801 (1973) (probation condition permitting warrantless searches does not constitute waiver of right to be searched only upon reasonable cause).

precedent that the terms of probation would not be in effect during the pendency of respondent's appeal.[9] Hence, under state law there was no effective waiver of respondent's Fourth Amendment rights.

The Court of Appeals correctly perceived that the February 27th proceedings did not alter the situation. (Pet. App. 6a-10a.)[10] It is uncontroverted that respondent was unaware of the prosecution's motion, did not have notice of the hearing, did not appear before the Court, and did not learn of the Court's order until the time of the search. Respondent having manifested no consent to the imminent imposition of the probationary terms at the sentencing hearing three months earlier, the proceedings on February 27th clearly did not comply with the requirements that "the waiver must appear of record to have been knowingly and intelligently made." *People v. Myers, supra,* 6 Cal.3d at 819, 494 P.2d at 689, 100 Cal.Rptr. at 617. Thus, the February 27th proceedings could not validly subject respondent to the search clause.

c. This conclusion is also compelled by the decision of the Superior Court setting aside respondent's probation revocation. That court found that respondent had

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[9]Once again, the Court of Appeals' ruling that respondent's probationary terms (and hence the search clause) were stayed by the sentencing judge has not been challenged by petitioner and is therefore the law of this state.

[10]The fact that the Court of Appeals chose to base its ruling on federal due process does not alter the fact that the same result is mandated not only by California law concerning advance waivers of Fourth Amendment rights, but also (as will be seen) by the state constitutional due process clause and by respondent's state and federal constitutional rights to be present at all stages of the proceedings.

not been "unequivocally apprised of his probationary status" and therefore determined that punishing him for his failure to abide by the probationary terms would violate due process of law. (E.R. 118.)[11] A *fortiori*, due process would be similarly offended by a holding that a court could strip respondent of his fundamental Fourth Amendment rights as of a specific date without his having been "unequivocally apprised" of *that* fact. Indeed, the absence of an unambiguous statement by the Court to respondent of his *current* status as a probationer (and respondent's unequivocal assent thereto) precludes the finding of a valid waiver of respondent's Fourth Amendment rights under California law.[12]

d. Apart from the notice and waiver problems, the February 27th proceedings were also rendered fatally defective by respondent's absence. (Pet.App. at 10a.)[13]

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[11]The Superior Court did not articulate whether it was relying on the federal or state constitutional provisions. Article I, Section 15 of the California Constitution guarantees defendants in state criminal proceedings that they will enjoy due process of law.

[12]It is true, as petitioner notes, that the Superior Court included a disclaimer that its decision should not be construed as disagreement with the District Court's ruling in this case that the March 3rd search was lawful. (E.R. 118-119.) However, the lawfulness of the search was not before the Superior Court, and the state court judges cannot be faulted for failing to recognize that their determination that there was inadequate notice to respondent concerning his probationary status under state law would be binding on a federal court. (See, Opp., *supra*, at 5-6.)

[13]Although the Court of Appeals declined to decide whether respondent's absence from the February 27th proceedings rendered them invalid (Pet.App. at 10a, n. 5), the case law on this subject also mandates the result reached by the Court of Appeals.

Both the state and federal constitutions guarantee criminal defendants the right to be present at all stages of the proceedings. See, *Illinois v. Allen,* 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970); *Olney v. Municipal Court,* 133 Cal.App.3d 455, 459, 184 Cal.Rptr. 78, 80 (1982); *People v. Kriss,* 96 Cal.App.3d 913, 916, 158 Cal.Rptr. 420, 421 (1979).[14]

At the same time, the California legislature has granted defendants in misdemeanor proceedings the right to be *absent* and to appear through counsel. See, Penal Code § 977(a). However, because exercise of this statutory right necessarily entails a waiver of the more fundamental right to be present, the California courts characterize the former as "conditional" in nature:

> A defendant who absents himself must do so with full knowledge of the pendency of the criminal proceedings, as the waiver of the right to be present must be a knowing and intelligent one.
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> *Olney v. Municipal Court, supra,* 133 Cal.App.3d at 460-461, 184 Cal.Rptr. at 81.

Turner v. Municipal Court, 131 Cal.App.3d 643, 648, 182 Cal.Rptr. 650, 652 (1982). Thus, where counsel appears without his client, the court must satisfy itself "that the acts of counsel are authorized by the absent defendant." *Olney v. Municipal Court, supra,* 133 Cal.App.3d at 461, 184 Cal.Rptr. at 81. See also, *Mills v. Municipal Court,* 10 Cal.3d 288, 304-305, 515 P.2d 273, 285, 110 Cal.Rptr. 329 (1973); *Turner v. Municipal Court, supra,* 131 Cal.

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[14]In California, the right to be present is secured by Article 1, Section 15, of the state constitution. See, *Olney v. Municipal Court, supra,* 133 Cal.App.3d at 459, 184 Cal.Rptr. at 80.

App.3d at 648, 182 Cal.Rptr. at 652; *People v. Kriss, supra,* 96 Cal.App.3d at 917, 158 Cal.Rptr. at 422.[15]

In this case the record establishes that respondent was not present at the February 27th hearing, that the Municipal Court noted respondent's absence but did not inquire concerning counsel's authority, and that a waiver of respondent's right to be present was not otherwise shown. Indeed, the uncontroverted evidence demonstrates that respondent was completely unaware of the proceedings, thereby precluding a finding that he was "knowingly" absent and had authorized the acts of counsel. Accordingly, under California law, respondent's constitutional right to be present was violated by the February 27th proceedings.

Moreover, prejudice to respondent was manifest in the conduct of those proceedings in his absence and without proper inquiry by the court.[16] First, as previously

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[15]Pragmatically, California's courts permit reliance upon defense counsel's representations that his client is knowingly absent and has authorized counsel to act on his behalf. *Olney v. v. Municipal Court, supra,* 133 Cal.App.3d at 461, n. 5, 184 Cal.Rptr. at 81; *People v. Singer,* 115 Cal.App.3d Supp. 7, 11, 171 Cal.Rptr. 587, 589 (1981). However, the case law affirmatively rejects petitioner's contentions that "notice to counsel is considered notice to the client. . . ." and that the Municipal Court was justified in assuming proper notice to and waiver by respondent from the appearance of his counsel at the hearing. See, e.g., *Turner v. Municipal Court, supra,* 131 Cal.App.3d at 648, 182 Cal.Rptr. at 652. (Compare, Pet. at 14.)

[16]An order issued in violation of a defendant's state constitutional right to be present cannot stand if the defendant was prejudiced by it. *People v. Kriss, supra,* 96 Cal.App.3d at 920, 158 Cal.Rptr. at 424; *People v. Williams,* 10 Cal.App.3d 745, 749-752, 89 Cal.Rptr. 364, 366-368 (1970).

demonstrated, the defective procedure ignored the requirement of California law that respondent expressly consent to imposition of the terms and conditions of probation. *People v. Mason, supra,* 5 Cal.3d at 763-764, 488 P.2d at 631-632, 97 Cal.Rptr. at 304-305. Second, and conversely, the February 27th proceedings emasculated respondent's right to *reject* probation and demand sentence. See, *In re Osslo, supra,* 51 Cal.2d at 382, 334 P.2d at 8. Third, the hearing *in absentia* during the pendency of the appeal deprived respondent of any opportunity to seek modification of specific probationary terms (such as the search clause) which he found objectionable. *Id.,* 51 Cal.2d at 380, 334 P.2d at 8. Fourth, and most fundamentally, the proceedings permitted the Municipal Court to strip respondent of his Fourth Amendment rights and to impose affirmative obligations upon him (including the requirement that he forego his Second Amendment right to bear arms), in circumstances which both disserved the rehabilitative purposes of the search clause,[17] and precluded timely efforts by respondent to conform his behavior to probation's affirmative mandates.

For all of these reasons, the February 27th hearing involved far more than "a purely legal matter . . . of the sort that would not give rise to the constitutional right to be present." (Pet. at 16, n. 12.) To the contrary, the prose-

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[17]As a matter of common sense, a probationary search clause cannot positively influence an individual's behavior if he is unaware that it has been imposed. If an individual has "*knowledge* he may be subject to a search at any time, he will be less inclined to have narcotics or dangerous drugs in his possession. [Emphasis added.])" *People v. Kern,* 264 Cal.App.2d 962, 965, 71 Cal.Rptr. 105, 107 (1968). Without notice, however, the search condition can have no such effect.

cution's motion was expressly intended to result in respondent's loss of fundamental rights and liberty interests under both the Fourth and Second Amendments; and the Court's order had precisely that effect, but there would certainly have been a different result if respondent had been present and had exercised one of the options set forth above. Consequently, under California law, the proceedings thoroughly emasculated respondent's right to be present.[18]

e. Petitioner's due process argument is similarly premised on a mischaracterization of the February 27th proceedings as "ministerial and perfunctory". (Pet. at 15, n. 12.) To the contrary, because the prosecution's motion contemplated respondent's immediate loss of his Fourth Amendment rights together with the imposition of affirmative restrictions on his liberty, the interests affected were so substantial as to require the minimal due process protection of actual notice of the hearing. (Pet.App. 8a.) Indeed, this conclusion is compelled by this Court's decisions requiring notice and other minimal due process safeguards to an individual whose fundamental rights or liberty interests are in peril. See, *Gardner v. Florida*, 430 U.S. 349,

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[18]In all likelihood, the same conclusion is compelled under federal constitutional law. Here, "a fair and just hearing [was indeed] thwarted by [respondent's] absence," [*United States v. Gagnon*, No. 84-690 (March 18, 1985), slip op. 4, quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105-106 (1934)], if only because respondent was denied the right to refuse probation by the instant procedures.

358, 362 (1977), *Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973); *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972).[19]

Moreover, petitioner dramatically exaggerates the legal and practical implications of the Court of Appeals' decision. The holding did not constitute "a departure from the principles of representative litigation." (Pet. at 10.)[20] Nor, as petitioner suggests, does the decision impose novel or burdensome obligations on either the prosecution or the courts. (Pet. at 10, 17.)[21] Instead, the Court of Ap-

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[19]Because the lack of notice precluded respondent's exercise of significant options which would have directly affected the outcome of the hearing (i.e., a rejection of probation), the interests at stake in this case were precisely those entailed in a sentencing hearing. See, e.g., *Gardner v. Florida, supra*, 430 U.S. at 362; *People v. Kriss, supra*, 96 Cal.App.3d at 920-921, 158 Cal.Rptr. at 424.

[20] Petitioner's histrionics to the contrary, the Court of Appeals' decision contemplates neither personal service on nor direct communication with the defendant. (Compare, Pet. at 10-11.) As the Court of Appeals repeatedly emphasized, the assurance of actual notice to defendant is all that is required: "We cannot be satisfied with inference of notice; we must have proof of it." (Pet.App. 9a.) Where, as here, the court and prosecution are placed on inquiry notice by the defendant's absence, the Court of Appeals' decision mandates only that the Court satisfy itself that counsel has in fact fulfilled his representative obligations by informing the defendant of the proceedings. This rule is, of course, entirely consistent with California law. (See, Opp. *supra* at 12-14.)

[21]Again, the Court's decision imposes no affirmative or duplicative obligations on the prosecution whatsoever. For example, if the Municipal Court had properly inquired and determined that defense counsel had *not* notified respondent of the proceedings, it could have (1) ordered a short continuance to permit such notice by counsel and/or the probation department, (2) forfeited bail, or (3) issued a bench warrant. See, e.g., California Penal Code § 1043(e). On the other hand, if it appeared

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peals' decision simply mandates adherence to routine procedures which have long been a part of California law. (See, Opp., *supra*, at 12-14.)

2. Petitioner inaccurately portrays the Court of Appeals' ruling on the good faith issue as "inconsistent" with this Court's decision in *United States v. Leon, supra*, 104 S.Ct. 3405 (1984). As the Court of Appeals recognized, the good faith exception should not be applied to a defective probation search, and even if it were applied, the instant search would still fail as objectively unreasonable.

a. After a cautious and painstaking cost-benefit analysis, this Court fashioned the good faith exception to the exclusionary rule in search warrant cases and expressly limited the exception to that unique context. *Id.* at 3421. Because in such cases the judgment of a neutral and detached magistrate is interjected between the investigating officers and the decision to search, the Court recognized that the exclusion of evidence where law enforcement officers reasonably relied in good faith "on a subsequently invalidated warrant" would not further the deterrent rationale of the rule. *Id.* Moreover, the application of a good faith exception in that context has the salutary effect of encouraging police to heed the courts' "strong preference" for the procurement of search warrants. *Id.* at 3416-3417.

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from the inquiry that respondent had "absented himself voluntarily with full knowledge" of the proceedings, the Court could have proceeded with the hearing. Penal Code § 1043(e)(4). Enforcement of these well established procedures would eliminate any "uncertainty" or potential for "mischief" (Pet. at 10), while avoiding the fundamentally unfair result that probation is imposed without prior notice to the defendant.

By contrast, there is no similar judicial policy favoring advance consent searches. Quite to the contrary, the courts are wary of such waivers and rigorously scrutinize the purported basis for them to assure that the defendant's right are not inadvertently or unknowingly forfeited. (See, Opp., *supra* at 9-10.) Any rule which permitted law enforcement officers to insulate their decision to conduct such searches on the grounds that *their* interpretation and reliance on a probation clause or other advance waiver was "reasonable" would seriously undermine *this* policy. At the same time, such a rule would actually frustrate the policy favoring the procurement of search warrants in all cases where the police officers believe that an advance waiver might arguably justify the intrusion.

Similarly, unlike search warrant cases, the decision to undertake an advance waiver search does *not* involve the judgment of a judicial officer. Instead, in most instances the police officers rely upon an order which predates the search, frequently by months or even years, for authority which they independently determine is applicable to the particular situation. Moreover, as distinguished from the search warrant context, in California and other states which do not require that the probation officer participate in the search, those who actually execute an advance consent search will frequently have no involvement in the procurement of the underlying court order and therefore will have no personal knowledge concerning the regularity of the proceedings in which it was entered.

Taken together, these factors introduce in advance consent cases greater uncertainty as to the validity of the judicial authority, while vesting greater discretion

in the police for determining whether a search is appropriate, than exists in search warrant cases. As a consequence, the objective reasonableness of the officers' conduct is a more elusive and less easily administered standard in this context, and there is an unacceptable risk that deterrable intrusions will go undetected and unremedied. Accordingly, the good faith exception to the exclusionary rule should not be adopted in the context of advance consent searches.

b. Even petitioner recognizes that if a warrantless search pursuant to a defective probation order is to come within the purview of the proposed good faith exception, it still must be conducted "consistently with . . . [applicable] law regarding the execution of probation searches. . . ." (Pet. at 22.) However, such was clearly not the case here.

In California, a probationer retains an expectation that his privacy will not be disturbed without "reasonable cause"—i.e., unless the "circumstances [indicate] that in connection with effective probation supervision a search is advisable." *People v. Guerrero,* 85 Cal.App.3d 572, 581-582, 149 Cal.Rptr. 558, 560 (1978). Petitioner concedes as much. (Pet. at 19-20, n. 13.) Nevertheless, in this case the officers determined to enter respondent's residence with full knowledge that his probation supervision had *not yet even begun.* Not only was respondent never assigned to a probation officer during the three and one-half months after his sentencing, but even at the February 27th hearing the prosecutor did not request and the Court did not order that respondent report to one. Thus, at the time of the search, respondent's supervision had never even been

tried, and there was no rational basis for the assertion that a search was "advisable" to render his supervision "effective."

Similarly, it is undisputed that the reports of gun fire (which assertedly justified the search) were received several weeks prior to March 3rd, at a time when even the prosecutor was confused as to whether respondent was on probation. (5/21/81 Tr. 97-101.) In these circumstances, respondent reasonably believed that he was not on probation and was not subject to any prohibitions against his possession and use of firearms. Once again, petitioner concedes as much. (Pet. at 23.) Indeed, as we have previously noted, petitioner does not challenge the Court of Appeals' determination that respondent was *not* on probation at that time.

Consequently, by March 3rd, the gun fire reports were several weeks stale and could not reasonably support an inference that firearms were still located on the premises. More importantly, because the complaints were received at a time when respondent did not know that he was on probation (and as matter of law was *not* on probation), they provided no logical basis for a belief that respondent would fail to dispossess himself of any and all weapons, once apprised of the fact that he was subject to the probationary mandates. Thus, the Court of Appeals correctly determined that the search "had a motive of avoidance of Fourth Amendment requirements . . ." and was not "reasonably related to the interests of effective probation supervision." (Pet.App. 11a-13a.) See, *United States v. Johnson,* 722 F.2d 525, 527 (9th Cir. 1983); *People v. Guerrero, supra,* 85 Cal.App.3d at 582, 149 Cal.

Rptr. at 559; *People v. Bremmer, supra,* 30 Cal.App.3d at 1064, 106 Cal.Rptr. at 801.[22]

c. The record also fully supports the Court of Appeals' conclusion that the officers in this case did not possess an objectively reasonable belief in the validity of the search clause. First, after the initial sentencing hearing, the officers knew that although respondent had been sentenced to formal probation, he was never placed under supervision or referred to the probation department.[23]

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[22]Contrary to petitioner's assertions, the Court of Appeals properly seized upon the prosecutor's failure to inform Judge MARLO of either respondent's suspected activities or of her own intentions to search respondent's residence, as further evidence in support of this conclusion. (See, Pet. at 24; Pet.App. 12a.) If in fact the stay had been validly lifted, then Judge MARLO was the individual who possessed the power to require respondent's supervision, to punish violations of his conditions, to modify those conditions, and to revoke probation. *In re Osslo, supra,* 51 Cal.2d at 380, 334 P.2d at 8. Thus, the prosecutor's decision to engineer the reinstatement order and then a search (but not to inform Judge MARLO of her intentions) demonstrates that she was not concerned with either respondent's rehabilitation or protection of the public, since she spurned the most efficacious means of accomplishing those ends.

Finally, there is evidence in the record suggesting that the very law enforcement personnel who conducted the search had been involved in a drug-related criminal investigation of respondent. (Pet.App. 12a-13a; Compare, Pet. 23.) On at least one recent occasion, the prosecutor and another member of the search party had gone to respondent's property to investigate a tip that he was cultivating marijuana. (5/21/81 Tr. 97, 102-103.) This evidence further corroborates the suggestion of a possible subterfuge.

[23]Because the local prosecutor was the motivating force for the search and was in fact the individual who finally determined at respondent's residence that the search should go forward, she was undeniably a member of the law enforcement team and her knowledge must be attributed to all of the executing officers. See, *United States v. Leon, supra,* 104 S.Ct. at 3421, n. 24.

Moreover, despite respondent's failure to report to a probation officer, there had been no effort to "revoke" his probation. Instead, when the gun fire complaints were received, the prosecutor expressed to the officers her good faith *doubts* that respondent was in fact on probation. (4/20/81 Tr. 173, 177-178.) Subsequently, when a hearing was held on her motion, the prosecutor's doubts were confirmed by Judge MARLO who ruled that probation was now "reinstated."

Similarly, the officers in the search party were fully aware of the inadequacies of the February 27th proceedings. The prosecutor who led the search, and who had personally engineered that hearing for the purpose of conducting the warrantless search, also knew that respondent had not been present in court. However, as a prosecutor in California courts, she was certainly charged with knowledge of Penal Code § 977(a) and of the state law requirements for a criminal defendant's effective waiver of his right to be present. (See, Opp. *supra* at 12-14.)

More fundamentally, prior to her final approval of the commencement of the search, the prosecutor learned from respondent's attorney that respondent had in fact received no notice of the February 27 hearing and order. The prosecutor was thereby alerted to a constitutional infirmity in the "reinstatement" order which had not been known to Judge MARLO at the time of those proceedings. Moments later, the prosecutor spoke with Judge MARLO himself who, having been apprised for the first time of respondent's lack of notice of the February 27th proceedings, declined to place his authority behind the search. (4/30/81 Tr. 200.) Nevertheless, despite their

awareness of this express ambivalence from the only individual who was authorized by California law to require respondent's supervision, the prosecutor ordered that the search begin and the officers carried it out.

In these circumstances, the decision to proceed with a search belies any assertion of objectively reasonable reliance on the February 27th order. Impetus for the search having arisen from suspected conduct predating the "reinstatement" order by several weeks, the search was conducted despite the officers' knowledge that respondent had received no opportunity whatsoever to conform his behavior to the probationary conditions by reason of a failure of actual notice to him. In other words, by petitioner's own admission, the officers undertook the search to determine "whether respondent had firearms" (Pet. at 24), but with the knowledge that respondent had never been told that he could not lawfully possess them. Thus, the prosecutor and officers knew of the fatal deficiencies in the probation order prior to commencing the search; and objectively reasonable officers should have realized that a warrantless search under its tarnished authority was both unreasonable and fundamentally unfair.

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CONCLUSION

For all the reasons set forth above, the petition for a writ of certiorari should be denied. Dated: May 15, 1986.

Respectfully submitted,

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